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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/698,650	10/31/2003	Charles V. Burton	ZMS-EF42US	3753
43541 7590 11/28/2007 WOOD, HERRON & EVANS (ZIMMER SPINE) 2700 CAREW TOWER 441 VINE STREET CINCINNATI, OH 45202			EXAMINER SWIGER III, JAMES L	
			ART UNIT 3733	PAPER NUMBER
			MAIL DATE 11/28/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

CT

Office Action Summary	Application No. 10/698,650	Applicant(s) BURTON, CHARLES V.	
	Examiner James L. Swiger	Art Unit 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 September 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 31-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 and 31-37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 10/31/2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1 and 3-5 rejected under 35 U.S.C. 102(e) as being anticipated by Wall et al. (US Patent 6,746,450). Wall et al. disclose a monolithic spinal fixation device comprising a spinal stabilization member (body 22), and a first and second anchoring members (14) that extend from the stabilization member (14) and also extend perpendicularly from the stabilization member and are parallel to each other. See also Figure 6. The device and anchoring members form a monolithic device that is capable of insertion in to the vertebrae to aid in spinal fixation.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Wall et al. '450 in view of Serhan et al. (US Pub 2002/0143329). Wall et al. discloses the claimed

invention except for a first and second anchoring means having a shape, specifically a cylindrical shape. Serhan et al. disclose a cylindrical shape (see Fig. 2a). This shape helps the spinal device cause minimal trauma to the tissues during insertion and also after implantation to the surrounding organs. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Wall et al. having at least the cylindrical shape in view of Serhan et al. to better use the device in the surgical area in use.

Claims 2, 7, 33-34 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wall et al. in view of Burton (US Patent 4,743,260). Wall et al. disclose the claimed invention except for a porous device, or where pores extend axially. Burton discloses the claimed device that has pores that may be made from biocompatible materials that are porous and aid in the acceptance and incorporation of natural bone (Col. 4, lines 45-52). Additionally, the pores created may be considered to extend at least axially, and with regard to the reference, replaneform structure may create pores that would extend along an axis as well. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Wall et al. having at least a porous structure in view of Burton to better incorporate the device into the bone over time.

Claims 35-36 and 31-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wall et al. in view of Burton (US Patent 4,743,260). The combination of Wall et al. and Burton disclose the claimed invention except for the pores having a certain range of sizes, for example, 190 and 1,200 microns. It would have been obvious

to one having ordinary skill in the art at the time the invention was made to have pores of that size, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Response to Arguments

Applicant's arguments with respect to claims 1-7 and 31-37 have been considered but are moot in view of the new ground(s) of rejection.

Applicant's arguments regarding the monolithic construction have been considered and have been found persuasive, however, the claimed invention is still anticipated by prior art. Additionally the arguments directed to Burton have not been found persuasive. New rejections are above.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See PTO-892.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to James L. Swiger whose telephone number is 571-272-5557. The examiner can normally be reached on Monday through Friday, 9:00am to 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Application/Control Number:
10/698,650
Art Unit: 3733

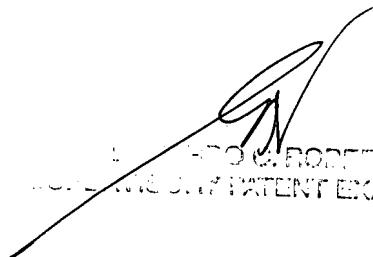
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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



JLS

11/25/02



ROBERT
PATENT EXAMINER